

TOPIC:**THE HIGHER EDUCATION OPPORTUNITY ACT II: STUDENT LENDING-RELATED REPORTING AND DISCLOSURE REQUIREMENTS****INTRODUCTION:**

On July 31, 2008, Congress passed the first full reauthorization of the Higher Education Act of 1965, as amended (P.L. 105-244), since 1998. After more than five years of consideration, Congress approved the Higher Education Opportunity Act (P.L. 110-315) (“HEOA” or the “Act”) on an overwhelmingly bipartisan basis. The President then signed the Act into law on August 14, 2008. The Act imposes a substantial number of new student lending related reporting and disclosure obligations on institutions that participate in Title IV federal student financial aid programs. Unless otherwise specified in the Act, those reporting and disclosure requirements are applicable as of the date of enactment, which is August 14, 2008. It is expected that the Secretary of Education (the “Secretary”) will provide guidance in the near future on compliance with some of the new requirements; nonetheless, for most requirements, the obligation to comply commences as of August 14, 2008.

Because the reporting and disclosure requirements discussed below are linked to an institution’s participation in the Title IV federal student financial aid programs, the Secretary is authorized to take administrative action, including the imposition of fines, against institutions that do not comply. The most severe penalty the Department could impose for failure to comply, however, is a limitation or termination of the institution’s participation in the Title IV financial aid programs.

This Note addresses, in general terms, the major new reporting and disclosure requirements included in the Act organized by general topic. (A separate Note, published today, addresses the Act’s other new reporting and disclosure obligations, unrelated to student lending). Attached to this Note is a more detailed explanation of each new reporting and disclosure requirement of the HEOA on a section-by-section basis. *The two documents are meant to be used in conjunction with one another* – with the general overview presented in this Note and the specifics of each new reporting obligation set forth in the attachment. Appropriate hyperlinks to the attachment are included in each section of this Note. Neither this Note nor the attachment constitute legal advice. Counsel are encouraged to review the HEOA for its impact on their specific institutions.

DISCUSSION:

Probably the largest set of new reporting and disclosure requirements included in the HEOA are those that relate to student lending, including disclosures related to Federal Family Education Loan (“FFEL”) program loans, private loans, and an institution’s preferred lender relationships.

[Institutional Disclosures Related to Preferred Lender Arrangements](#)

Under Sections [152 and 153](#) of the Act, each institution that has a preferred lender arrangement [\[1\]](#) is required, as of August 14, 2008, to make a number of disclosures on its website and in any marketing materials it sends to students regarding financial aid options. HEOA § 153(a)(2)(A); § 487(h). Institutions that offer private loans must disclose, in a user-friendly manner, among other things, that federal Title IV assistance is available and that the terms of a federal loan may be more favorable than the terms of the private loan. HEOA § 152(a)(1)(B). In addition, the Act requires the Secretary, within 18 months, to develop a set of additional minimum disclosures that institutions and lenders must make to borrowers. HEOA § 153(a)(2)(B).

Also effective August 14, 2008, section 487 requires institutions with preferred lender lists to make available on an annual basis a list of the lenders and loans, including private loans, that the institution endorses or recommends through its preferred lender arrangements. [HEOA § 487\(h\)](#). This list also must disclose all the information required to be disclosed to borrowers before a loan is disbursed (see HEOA § 433) and must explain why the institution entered into each preferred lender arrangement. (See [HEOA § 487](#)). Specifically, the list must disclose the method and criteria used to select its preferred lenders, including (a) payment of origination or other fees for borrowers; (b) highly competitive terms and conditions, including interest rates; (c) high-quality servicing; and (d) benefits beyond the standard terms. It also must clearly state that students do not have to borrow from a lender on the list. (See [HEOA § 487\(h\)](#)). Further, the list must contain at least three FFEL lenders that are not affiliates of each other and if the institution endorses private loans the list must include at least two lenders that are not affiliates of one another. For each lender, the list must disclose whether and to what other lender it is an affiliate and if it is an affiliate of another lender, describe the affiliation. *Id.* [\[2\]](#)

Further, an institution with a preferred lender list may not deny or impede a borrower's loan certification if he or she chooses a lender that is not on the institution's preferred lender list. The institution must include a statement indicating such on its website and in any publications, mailings or electronic messages distributed to prospective or current students or their families discussing financial aid opportunities. See HEOA § 487. This requirement is also effective August 14, 2008.

Code of Conduct Disclosures for Institutions with Preferred Lender Arrangements

The HEOA conditions the eligibility to participate in the Title IV programs of any institution with a preferred lender list on its development of and compliance with a code of conduct for its financial aid personnel. [HEOA § 487\(a\)\(25\); § 487\(e\)](#); § 153(c)(3). The code must be published on the institution's website and on an annual basis the institution must inform those with responsibilities related to Title IV federal loans of the code's provisions. *Id.* At a minimum, the code must contain provisions prohibiting conflicts of interest, revenue sharing arrangements, the solicitation or acceptance of gifts, receipt of fees, payments or other financial benefits for consulting services by anyone in the institution with responsibilities for student loans, assistance with call centers or staffing, the acceptance of funds to be used for private loans in exchange for providing concessions to a private lender, and the acceptance of anything of value except reimbursement for reasonable expenses by an employee with responsibilities for financial assistance that sits on a lender's advisory board or commission. *Id.* This requirement is effective August 14, 2008.

General Institution Disclosures to Borrowers

Effective August 14, 2008, institutions must make a number of specific disclosures to students borrowing FFEL loans, including, among other things, the maximum amount of federal grant and loan aid available under Title IV, the interest rate and terms and conditions of the loan, information on charges associated with the loan, the annual and aggregate maximum amounts that may be borrowed under the FFEL program, the amount of interest that may accrue on the student's loan, the consequences of default, contact information for the lender, and any other information the Secretary requires be disclosed [\[3\]](#). See HEOA § 152(a)(1)(A).

Institutions that provide information on private loans to students also must disclose, in a manner that makes clear that these loans and this information are distinct from Title IV loans, that the borrower may qualify for Title IV federal financial assistance and that the terms of such a loan may be more favorable than the terms

of a private loan, as well as the Truth in Lending Act information required under Title X of the HEOA. See HEOA § 152(a)(1)(B).

Disclosures Required of Institutions that Qualify as Eligible Lenders [\[4\]](#)

Any institution determined to be an eligible lender for Title IV purposes (i.e., any school acting as lender) must, effective August 14, 2008, provide a notification when they approve a loan summarizing – in simple, understandable terms – the rights and responsibilities of the borrower and the consequences of default, including that the default will be reported to a consumer reporting agency. [HEOA § 433\(c\)](#). The institution must then make a number of disclosures, either in written or by electronic means, before disbursing the loan. HEOA § 433(a). Those disclosures include, among other things, a prominent statement that the loan must be repaid, the loan principal, charges associated with the loan, the interest rate, information regarding the payment of interest while the borrower is in school if applicable, repayment information including the types of repayment plans available and an estimate of the borrower's monthly payment, consolidation or refinancing options, information on deferral, forbearance and loan forgiveness options, and information on the consequences of default. *Id.*

Also effective August 14, 2008, institutions are required to continue providing entrance and exit counseling to student borrowers, though now those requirements are statutory and apply to all types of Title IV loans. HEOA § 485(b), [\(l\)](#). The counseling can be done in person, online, or through documents that the borrower acknowledges having received and reviewed. *Id.* Information that must be addressed during counseling includes the effect of accepting a loan on the student's eligibility for other federal financial assistance, the ability to pay interest on some loans while in school, descriptions of loan forgiveness plans and forbearance requirements, and debt management techniques. *Id.*

Further, not less than 30 days or more than 150 days before the borrower's first loan payment is due, institutional lenders must make a series of new disclosures, either in written or by electronic means. [HEOA § 433\(b\)](#). Those disclosures include, among other things, the lender's or servicer's name and address, the date repayment begins and a repayment schedule, an estimate of the balance owed, interest rate information, fees associated with repayment, the borrower's prepayment rights, repayment options and benefits, consolidation and refinancing options, and additional resources where the borrower may receive advice on loan repayment. *Id.* These requirements are effective August 14, 2008.

Beginning July 1, 2009, institutional lenders will be required to provide each borrower, during repayment, with a bill for each payment that details the original principal of the loan, the current balance, the interest rate on the loan, the total amount the borrower has paid in interest, the aggregate amount the borrower has paid on the loan, a description of each fee the borrower was charged during the preceding payment period, the loan payment due date, the lender's or servicer's address and toll-free phone number, and a reminder that the borrower has the option of changing repayment plans. [HEOA § 433\(e\)\(1\)](#). If a borrower notifies the institution that he or she is having difficulty making his or her loan payments, the institution must provide information on the repayment plans available to the borrower, the requirements for obtaining a forbearance, and other options available to avoid default. [HEOA § 433\(e\)\(2\)](#). For borrowers that are 60 days or more delinquent in their loan payments, institutional lenders must provide the date on which the loan will default, the minimum payment the borrower must make to avoid default, options available to avoid default, discharge options, and additional resources where the borrower may receive assistance. See HEOA § 433(e)(3). The requirements related to delinquent borrowers are effective beginning with loans that become delinquent on or after July 1, 2009.

School As Lender Audit

Effective August 14, 2008, the HEOA requires institutions serving as eligible lenders to submit an annual compliance audit to the Secretary to determine whether the institution is using all special allowance payments, interest subsidies, interest payments, and proceeds from the sale of loans for need-based grant programs. [HEOA § 435\(d\)\(8\)](#). The compliance audit must also identify whether a reasonable portion of these proceeds are being used for administrative expenses, and whether the institution is using the proceeds to

supplement (rather than supplant) other funds it receives for need-based financial aid. *Id.*

Private Loans – Prohibition on Gifts and Co-Branding, Annual Reporting, and Student Self-Certification

[Title X](#) of the HEOA – the Private Student Loan Transparency and Improvement Act –amends the Truth in Lending Act (“TILA”) to make it applicable to all private student loans and to prohibit a private educational lender from offering or providing any gift to institutions or their personnel in exchange for any advantage related to loan activities, and to prohibit educational lenders from engaging in revenue sharing with institutions. Although the prohibitions and reporting requirements of this section apply to lenders rather than institutions, the reporting those lenders will be making directly relates to their relationships and interactions with institutions and their financial aid personnel.

Under Title X, a private student loan lender may not offer gifts to an institution or one of its employees or agents in exchange for any advantage provided to the lender with regard to the provision of private loans to the institution’s students. A private lender also may not use an institution’s name, logo, mascot or any other representation of the institution to market its loans. An institution’s financial aid personnel may not receive anything of value for serving on an advisory board for a lender (they may, however, have their reasonable expenses reimbursed). Private lenders may not penalize borrowers for prepayment of their loans. All of these prohibitions become effective immediately upon enactment of the HEA except the co-branding prohibition, which is not effective until 18 months after enactment (February 2010). See TILA § 140(a)-(e).

Further, any private lender that has a preferred lender arrangement with an institution must provide an annual report to that institution, including a copy of the disclosures required to be made when a loan is approved (see TILA § 128(e)) for each type of private loan the lender plans to offer to a student at the institution. See TILA § 128(e)(5), (11).

Title X also requires that the Secretary, with the Board of Governors of the Federal Reserve System, develop a self-certification that will be available to students through each institution’s financial aid office. Once this form is developed – no later than 18 months after enactment of the HEOA – students that wish to obtain a private loan must provide their lender with a signed copy of the self certification. In general, the form will contain disclosures about the student’s eligibility for Title IV federal financial aid, the impact of taking out a private loan on that eligibility, the student’s cost of attendance, and details of the student’s estimated federal financial assistance. See TILA § 128(e)(3) and HEOA § 155.

CONCLUSION:

The HEOA imposes a large number of new reporting obligations on colleges and universities related to student lending practices. Although guidance, and in some cases model disclosure forms, are forthcoming from the Secretary on some of the new requirements, responsibility for compliance begins as of August 14, 2008 for the majority of new obligations, which became effective on that date. Counsel should work with their institution’s financial aid personnel to familiarize themselves with the new reporting and disclosure requirements and develop systems for compliance. The possible penalties for non-compliance – limitation or loss of Title IV financial aid funds – are simply too great.

[FOOTNOTES](#)

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RESOURCES:

- [Attachment: New Higher Education Opportunity Act Reporting and Disclosure Requirements by Section](#)

Statutes and Regulations:

- [The Higher Education Opportunity Act, P.L. 110-315](#)
- [Conference Report – H. Report 110-803 \(to accompany H.R. 4137\)](#)
- [Department of Education Federal Register Notice of Negotiated Rule-Making](#)
- [U.S. Department of Education Web Page on 2008 Higher Education Opportunity Act](#)

Other Resources:

- [The Higher Education Opportunity Act I: New Reporting and Disclosure Requirements for Colleges and Universities](#)
- [American Council on Education \(ACE\) Analysis of Higher Education Act Reauthorization](#)
- [Association of American Universities \(AAU\) Comparison of House and Senate Bills and Final Higher Education Opportunity Act](#)
- [National Association of Student Financial Aid Administrators \(NASFAA\) Summary of Higher Education Act](#)
- [Higher Education Act of 1965, as amended, Title IV Parts B, D, G and I with changes by Higher Education Opportunity Act of 2008 Inserted \(from National Council of Higher Education Loan Programs\)](#)

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